2017's Top Twenty Legal Trends for Automobile Dealers

By Eric L. Chase©

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NOTE: 2016 Rankings are in parentheses; NR (Not Rated in 2016).

DealersEdge

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The 2016 election season, with the unprecedented presidential election upset over Hillary Clinton by political novice Donald Trump catapults this phenomenon into first place among 2017's legal trends for America's auto dealers. This is not to inject political partisanship into this annual analysis of legal issues for dealers, but rather, to analyze the significant legal, regulatory, financial, operational, and practical consequences for U.S. dealers that stem from what happened in November 2016.

As every dealer knows only too well, the policies of elected government officials and appointees at federal and state levels may directly drive aspects of dealer operations, revenues, motor vehicles and other products with numerous legal and regulatory tentacles. This cycle will especially be impactful. Fiat Chrysler's CEO Sergio Marchionne called the Trump win a "game changer" for the auto industry. *Bloomberg.com/videos*, Nov. 25, 2014. Marchionne's conclusion echoes that of dozens of industry professionals and lawmakers. Much of the auto industry interest is focused on carmakers, but the impact on dealers will be profound and far-reaching. Therefore, this is clearly the #1 legal trend for auto dealers in 2017.

A Trump administration promises to ease regulatory burdens on small businesses, including most dealers, by sunsetting or repealing laws and regulations that impose unnecessary hardship, needless paperwork, redundancy and cost on dealerships and other businesses in America. *See, e.g.*, Ryan Beene, "The industry sees a window for some regulatory relief," Automotive News, Nov. 14, 2016. Some commenters are more emphatic: "With a Republican House and Senate, President-elect Trump has an opportunity to eliminate many of the regulations that have held back economic growth." Peter J. Wallison, "What Dismantling Dodd-Frank Can Do," Wall Street Journal, Nov. 17, 2016. A similar pattern of relief for dealers may also emerge across the majority of states in which Republicans control executive and/or legislative branches. Perhaps the stock market run-up since the election signals investor and consumer confidence that will encourage deregulation.

Furthermore, anticipated court appointments could solidify a U.S. Supreme Court majority that could be perceived as more hospitable to business interests than might have been the case in the past eight years under President Barack Obama, or if Hillary Clinton had won. The current 4-4 left-right deadlock should end soon with a replacement for the late Justice Antonin Scalia, who, Mr. Trump says, should espouse the same judicial philosophy as Justice Scalia. Appointments to lower federal courts and to state courts are apt to be in the same vein. By the end of a Trump term, every Federal Court of Appeals could have majorities of Republican-appointed judges. *See* Linda Greenhouse, "Under Trump, the Federal Courts Will Be Up For Grabs," N.Y. Times, Dec. 8, 2016.

The list of possible areas for specific electoral impact on dealers' interests is lengthy: Obamacare; the CFPB's dive into consumer loan provisions and consumer arbitration agreements; the environment and EPA regulation; trade agreements; corporate and individual taxes; workforce and wage/pay rules, *etc.*

Regardless of one's political viewpoint, the new administration will generate profound substantive changes for car dealers in 2017 and beyond. Further, state governments are now mostly in Republican hands, and dealers will likely observe more business-friendly attitudes there as well. Of course, none of this will be without controversy. In the minority, Democrats promise strategic resistance to appointments and policies.

The election fallout is the year's #1 trend, but other critical issues for dealers abound, as indicated in the next 19 trends. Franchisors, emboldened by high sales, have ramped up their edicts to dealers on facilities, sales and CSI; franchisor misconduct and stewardship over dealer networks will be significant through the year; the self-driving car future is still anticipatory, yet already important. And much more.

For dealers, the "most important issues" will be those that impact them specifically. This year's list covers most of the key legal issues for most dealers in 2017 and beyond.

The ranking of the top twenty legal issues/trends is based on three factors: 1) the likely number of dealers affected; 2) the probability of change from the current situation; and 3) the seriousness of a trend/issue impact on the lives of dealers.

1. The Amazing 2016 Elections, and How the Post-Election Political Landscape of 2017 and Beyond Could Profoundly Change and Influence Laws, Regulations, Enforcement, and Profitability for Dealers (2)

> *"Perhaps no industry could be affected in more ways by the new administration than the auto business."*
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> Bill Vlasic, "Worried Auto Industry Braces for Change Under Trump," N.Y. Times, Dec. 8, 2016.

President Trump promises a friendlier, less onerous and less expensive legal and regulatory environment for large and small American businesses, including auto dealers. In addition to the Trump ascendency, 2017 will mark the first time since the election cycle of 1928 that the electorate has chosen a Republican president with a Republican majority in both the House and the Senate. Across the 50 states, moreover, nearly 70% of the governors are Republicans. And "Republicans control both [state legislative] chambers in 32 states." Jennifer Hickey, "Republicans build on their dominance in state legislatures," *Foxnews.com*, Nov. 18, 2016. Love it or hate it: the government framework for 2017 in America is mostly red. In their planning for 2017 and in later years, dealers should take stock of how this political reality should affect their businesses and operations from a legal and regulatory perspective.

The full breadth and scope of this federal and state electoral phenomenon on car dealers cannot be foreseen in detail or with certainty. Indeed, some say that the surprise electoral results may drive uncertainty. *See, e.g.*, Michael Wagland, Melissa Burden and Keith Long, "Trump presidency drives uncertainty into auto industry," The Detroit News, Nov. 10, 2016. Yet there are solid bets about significant changes across a variety of subject areas in the auto industry, and some likely consequences have worldwide implications. "Executives in corner offices from Germany to Detroit are cautiously monitoring President-elect Donald Trump's emerging administration to see whether it carries through with the Republican's campaign promises of renegotiating trade deals, imposing hefty tariffs, and rolling back government regulations on business and industry."

Michael Wayland, "Automakers await the Trump effect," Detroit News, Nov. 18, 2016.

Big questions: For dealers, will regulatory burdens actually be eased? Will dealership compliance requirements and associated expenses recede? Will new tax policies and possible lower taxes generate more retail activity? Will Democrat resistance be sufficiently strong to defeat or compromise the Trump agenda? In October 2016, Mr. Trump promised: "For every new federal regulation, two existing regulations must be eliminated." "Manufacturing's Greatest Days Lie Ahead," *usnews.com*, Dec. 12, 2016. Whether this promise will or can be kept remains to be seen. In the past, similar promises were routinely made, only to be broken. Yet it is likely that the early days of the administration will witness a significant effort to soften bureaucratic requirements in businesses.

As of the date of this publication, cabinet level and some lower appointments suggest that conventionally conservative office holders will, indeed, seek to downsize the federal bureaucracy, and limit its reach into small businesses. If this scenario unfolds, dealers will reap more net income, need more employees, and attract more retail customers. It should be expected that at least some major steps may be taken unilaterally by the new president who says his early executive orders may reverse many of his predecessor's.

Mr. Trump envisions that consumers will have additional purchasing power to buy cars and other products. He predicts sustained 4% yearly GDP growth. Is his vision too rosy to achieve? Maybe: "There are few obvious means for Mr. Trump to deliver on his promise [to stimulate a 4% annual GDP increase]." Binyamin Appelbaum and Robert Pear, "The 5 Easiest and 5 Most Difficult Promises for Donald Trump to Keep," N.Y. Times, Dec. 7, 2016.

Obamacare, as it will probably exist through all or most of 2017, could thereafter dramatically change or even disappear in its current form by the end of the year; generous subsidies to electric carmakers and consumers, and other environmental priorities will almost certainly shrink or go away; pressures on factories and dealers to promote sales of cars that consume lower amounts of fossil fuels will deflate; taxes on businesses will probably be reduced, and individual tax rates could be consolidated into three (lower) brackets from the current seven, with overall reductions. (Of course, the national debt will likely continue to soar.)

Taken together, these and myriad other developments could stimulate higher retail auto sales across the board, even though a slight decline in sales for 2017 is still the current expectation from many industry forecasters, although that forecast is improving. Higher interest rates (a virtual certainty) could cool the expected buying spree. Yet dealership buy-sell activity, on a torrid pace through 2016, could increase, with blue sky values climbing even further.

President Trump vowed to "repeal and replace" Obamacare to make health care both more affordable, more accessible, and better for the nation's health. His choice for secretary of Health and Human Services, Tom Price (a congressman who happens to be an orthopedic surgeon), seems to confirm Trump's direction. "If President-elect Donald J. Trump wanted a cabinet secretary who could help him dismantle and replace President Obama's health care law, he could not have found anyone more prepared than Representative Tom Price, who has been studying how to accomplish that goal for more than six years." Robert Pear, "Tom Price, Obamacare Critic, Is Said To Be Trump Selection for Health Secretary," N.Y. Times, Nov. 29, 2016. By 2018, assuming new health care legislation is enacted in 2017, it could impact nearly every dealer's bottom line in a positive way.

In addition, the new administration, with a cooperative Congress on at least several core priorities, will surely roll back perceived over-reaches on behalf of consumers by the FTC and the CFPB. *See*, Hannah Lutz, "Trump GOP Congress may curtail CFPB oversight of auto lending," Automotive News, Nov. 9, 2016. And, see also, Ms. Lutz' article, "CFPB future grows cloudy under Trump appointments," Automotive News, Dec. 7, 2016. Yet, consumer champion Senator Elizabeth Warren and others vow to continue the fight for consumer rights in ways that could challenge the Trump juggernaut.

None of the anticipated de- and re-regulation efforts will seamlessly flow at the federal level, even with Republican executive and legislative control. In addition to splits between the parties on major issues, there will also be some disagreement among Republican legislators. Even if one plays the "devil's advocate" game, however, most scenarios for the coming year generate optimism for the profitability and growth of America's auto dealers, barring an unforeseen major crisis.

Bottom line: For dealers, the election results will translate into serious changes in their businesses and lives. Many of those changes should increase their bottom lines. In 2017, dealers are likely to see a lessening of perceived governmental regulatory intrusions. If Obamacare is repealed, expect a near seamless and timely replacement. (To not have an immediate health care replacement program would be problematic.) But it will take more than one year of legislative action to have a significant and enduring financially positive impact on dealer operations, and much of the impact might have to await the beginning of 2018. With Trump/Pence persuasion and influence, Ford will keep certain Mexican-bound production capability in Kentucky, and Carrier will retain nearly 1,000 employees in Indiana, instead of moving the positions to Mexico. Add Soft Bank's founder's $50 billion investment commitment to America, and we see early harbingers of more to come. See Michael J. de la Merced, "After Meeting Trump, Japanese Mogul Pledges $50 Billion Investment in the U.S.," N.Y. Times, Dec. 6, 2016. If so, look for a business boom or boomlet in 2017. From a business outlook, pre-inauguration developments suggest a good or very good financial 2017 for dealers.

2. Will 2017 Be Another Year of Automaker (and Supplier) Misconduct and Challenges to Brand Integrity? How Bad Actors at Factories Injure People, Hurt Dealers and Enrage the Public. What Dealers Can and Should Do (1)

Just ask VW: 2016 was one horrific year, and some of the negative consequences are not quite over. The VW emissions fraud and settlements may be over, or nearly so, but its massive scope causes concerns to linger. Takata has been another enormous hit against both specific manufacturing, but also against the image of auto industry integrity. Is more coming?

Bottom line: Hopefully, we have seen the worst of highly publicized auto brand misconduct, and 2017 will be the year to regain public confidence. Dealers have learned how to cope with customer outrage that accompanies brand dishonesty and malfeasance. With intelligent management in a crisis (not to mention a huge checkbook), VW could be out of the woods in 2017. The mostly generous settlement payments to VW dealers was probably a master stroke. That said, if automakers have not cured their integrity image problems, consumers will punish them by going to those brands that keep their faith.

3. Increased Retail Sales and Higher Dealership Values Affect Dealer-Franchisor Relationships; the Phenomenon of "Unreasonable" Factory Demands, Standards and Practices (4)

It is axiomatic that high retail sales and dealer profitability stoke the fires of carmakers to demand more from dealers in facilities, sales and CSI. We are in a very profitable time now, and auto franchisors continue to pressure dealers – with both carrots and sticks.

Bottom line: Dealers cannot escape the tsunami of auto franchisors that establish dealer initiatives during good economic times. This year will see more of the usual incentives and pressures for higher sales, more dedicated employees and improved facilities. Once again, some franchisors will accompany their "requests" with threats and unreasonable requirements. The old chestnut of requiring dealers to perform in sales and CSI at or above "average," will persist. Dealers should not sign onto such standards. More litigation on these and similar issues will develop in 2017.

4. State Franchise Laws: The Continuing Need to Level the Playing Field; the NADA and State Associations are Ever More Important to Franchised Dealers; the Tesla Story Continues (5)

This is not new. And it's not just the Tesla legal battles that stand as threats to state auto franchise protections. The fight over the continuing viability of state franchise laws continues. *See* Roger M. Quinland, "Has the Traditional Automobile Franchise System Run Out of Gas?" *The Franchise Lawyer*, Summer 2013. On November 30, 2016, Tesla scored a significant win (at least for now) in Virginia when Virginia's Commissioner of Motor Vehicles ruled that, in the Richmond area, Tesla could "operate as both a manufacturer and a dealer of its electric motor vehicles." "Tesla Just Won a Major Regulatory Battle," *Fortune.com*, Nov. 30, 2016. This is a minor setback for dealers and their associations in the Tesla war (with a likely appeal coming). The game is far from over.

Bottom line: With Tesla, the anti-franchise crowd has been getting some traction with regulators and the public, and both wins and losses. But do not look for any material cut-back of dealer state legal protections in 2017. The NADA and state and metro dealer associations wield enormous influence and power. Moreover, their professionals tend to be highly talented and effective advocates for both dealer and consumer rights. Thanks to them – and to the elections of 2016 – dealers should not expect any retrenchment of their franchise rights in 2017. Intra-brand dealer competition is in the public interest as it promotes competitive pricing and high quality service. Indeed, the march to further sensible protections in state laws will continue.

5. Autonomous Cars: How Self Driving Vehicles Could Shape the Way We Travel, the Way We Retail, the Way Dealers Interact with their Franchisors, and the Laws that Govern Drivers, Dealers and Automakers (NR)

The day is coming when autonomous vehicles will be commonplace, although there is vigorous disagreement about how soon. Some say as early as next year; others contend that self-driving cars in high numbers and percentages might not happen for more than a decade. Whenever the trend takes hold, however, it will not come as a sudden shift in the cars Americans buy. Rather, such an industry conversion should be in phases over years. Mercedes-Benz USA's CEO opines that driverless cars will co-exist with "traditional cars" for 20 or 25 years. Russ Mitchell, "Human drivers will bully robot cars, says CEO of Mercedes-Benz USA," Los Angeles Times, Nov. 15, 2016.

The impact of driverless cars in America may be on the verge of the most significant change in auto travel since the introduction of the assembly line to Henry Ford's Model T. (Actually, Ransom Olds was probably the first to apply the assembly line to the Olds Motor Vehicle Company in 1901, but you get the point.) The consequences of such a development will be far and wide, and the legal landscape will look very different from today.

A month before the 2016 elections, CEO Mitch Bainwol of the Alliance of Automobile Manufacturers said, "The next year or two or three will be really important for us, and it will be atypically important," Ryan Beene, "Fight for Congress puts auto agenda in play," *Autonews.com*, Oct. 17, 2016. Bainwol was referring to two core issues: Fuel economy regulations and autonomous vehicles. Now, with the elections behind us, the trajectory is set in the direction of a regulatory storm over the introduction of driverless cars.

Some of the foreseeable changes are very positive: serious accidents would plummet, along with deaths, injuries, property damage, drunk driving and insurance costs; fuel consumption would lessen; people confined to their homes by age or infirmity would be liberated to ride in a motor vehicle; and car insurance would cost a fraction of today's outlay. With "sharing" arrangements, consumers can save on costs, and enjoy ownership in multiple vehicles. Sales practices and financing methodology would be revamped. Shared ownership/leasing will be common. New laws and regulations are already in draft.

For dealers, the autonomous car trend would almost certainly be good for business. With so many more "users," there could be demand for millions of additional vehicles, spurring a rise in demand for sales and service.

Will driverless cars really be common in just a couple of years as some predict, or is "the era of the driverless car still over the horizon?" Some experts suggest "[i]t's a decade or more down the road." Richard Truett, "Reality Check: Face it; those fully autonomous vehicles won't arrive for a very long time," *Automotive News*, Oct. 10, 2016. On October 17, 2016, Automotive News editorialized caution: "Don't risk public safety in quest for self-driving cars," *autonews.com*, Oct. 17, 2016. But the assessment here is that we will see the phenomenon appear gradually, in phases, and that there will be serial new product entries in small doses before 2020. After that, we should see steady growth. For today's children and their children, autonomous vehicles will rule.

Of course, autonomous vehicles are not immune from accidents wrought by either human action or technological failure or imperfection. We have already seen examples of such failures that, no doubt, will happen, but will be ameliorated over time with improved technology.

Bottom line: Laws are being drafted to test and anticipate the reality of self-driving cars on the roads. We will likely see them soon, but, at first, in small numbers that will grow over years or decades. Safety is a primary concern. See, Keith Laing, "Feds want pre-approval of safety of self-driving cars," Detroitnews.com, Sept. 20, 2016. Regulatory and statutory issues for dealers retailing self-driving cars will grow over time. See Keith Naughton, "Michigan Enacts First Law for Testing, Sales of Driverless Cars," Bloomberg.com, Dec. 9, 2016. We are years away from anything like the dominance of self-driving products. Stay tuned.

6. Workforce Issues and Unionization (6)

Here's another one in which the government has been a (maybe the) key player. But the Trump administration will likely put some fairness into the equation from dealers' perspectives. The election showed an unexpectedly high labor union member vote for Trump, and some see this as a trend that will continue. *See*, Harold Meyerson, "Donald Trump could kill the American union," Washington Post, Nov. 23, 2016. And the courts have already temporarily blocked the Obama administration's extension of mandatory overtime pay for workers earning less than $47,500, with hope for employers that the block will become permanent. *See*, Daniel Wiessner and Robert Iafolla, "Judge blocks Obama rule extending overtime pay to 4.2 million U.S. workers," Reuters, Nov. 23, 2016.

Bottom line: Between now and 2018, look for meaningful softening of what dealers see as an eight-year "labor war on employers and businesses." With new appointments ahead, the NLRB will no longer be the steady force it has become in routinely supporting pro-union measures with dealers and other businesses cast as enemies.

7. Involuntary Termination (9)

In *Beck Chevrolet Co., Inc. v. General Motors LLC*, 27 N.Y. 3d 379 (2016), the New York Court of Appeals spanked GM for its standard in measuring dealer sales performance in a franchise termination context. The court deemed GM unreasonable not to account properly for local circumstances in assessing dealer sales performance. Challenges to automakers' pronouncements on performance standards are proliferating.

Bottom line: Notices of termination are relatively rare, but termination threats are on the rise. Dealers should see only a small number of notices of termination in 2017, but 10% of dealers or more could see explicit written warnings, mostly for allegedly deficient sales or facilities. Dealers who believe that their franchisors act unreasonably in threatening termination will increase their opposition to unfairly imposed standards in 2017. Do not sign franchisor agreements that admit defaults and/or require "average or above" performance on sales and/or CSI.

8. Buy-Sell Activity: Is the Bull Market Over for Dealerships? Will There Be a Downturn? Rights of First Refusal (7)

Forecasts of downturns in 2017 include goodwill valuations. Of course, what actually happens will vary by brand and geography. Rights of First Refusal ("ROFRs") continue to cause controversies with varying approaches in state franchise laws. Look for steady values for highly profitable franchises such as Mercedes and Audi. Since 2013, the run-up of transactions has shown an increase of over 90% with many large new entrants, notably Berkshire Hathaway Automotive. Professional brokerages have prospered, and several offer a high level of sophistication. Despite the long run of increasing transactions, a return to "normal" interest rates could be the catalyst for a possible slow-down. Moreover, increased construction, aggressive image programs, and labor costs could have a negative impact.

Factory exercises of ROFRs continue to be controversial. Buyers – sellers, too – often develop sound strategies to avoid "cherry picking" franchisors seeking to exercise a right to take their brands out of a dealer marketing a business with multiple brands in it.

Bottom line: Look for uncertain transaction values and maybe some downturn in total transactions in 2017. Even so, there could be a Trump surge in the economy that will continue the high values. Any dip would follow a couple of very strong years in 2015 and 2016. Moreover, the industry optimism in the aftermath of the 2016 election may spark more interest and higher blue sky numbers, especially for high line brands. As of this writing, many forecasters who were predicting a 2017 downturn, are now hedging their bets – as I am. I see a good 2017 for the auto industry and dealer buy-sells. If you are worried about a ROFR, you will need an experienced attorney in this field.

9. Privacy and Identity Theft: The Brave New World of Data Control and Cybersecurity; Millennial Reliance on the Internet; Hacking Can Happen Anywhere (11)

Hacking and identity theft have become booming industries in America and elsewhere. This topic is so enormous and pervasive that every dealer needs to pay close attention to the many tentacles and to stay on top of fast-moving developments and changes.

Cybersecurity has become a huge American industry – for national security as well as civilian commerce.

Bottom line: Every dealer must have a competent specialist to oversee and monitor these connected concerns. Hacking and identity theft become more prevalent and risky every year. We will see more of it in 2017. Also, millennials do more shopping and buying online every year. See, Gary Galloway, "Where Car Dealers Can Meet the Millennials," Wardsauto.com, Nov. 29, 2016. This trend of online commercial activity presents both opportunities and vulnerabilities for dealers, because online marketing can yield more sales, efficiency, and large revenues, but it may open the door to increased cyber fraud and legal risk for dealers.

10. Consumerism (8)

Finally, the unbroken trend for judges, legislators and regulators to worship at the legal altar of the consumer may be offset somewhat by reality, fairness and common sense. The CFPB, for example, will certainly see more roadblocks to its quest to exalt consumers over everything. A 2016 Court of Appeals decision holding the CFPB "structurally unconstitutional" is under legal challenge on further appeal. *PHH Corporation v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016).

Bottom line: In 2017, the consumer will still be king, but the kingdom should shrink a bit. Although the political left (think Sanders, Warren) have enjoyed presiding over steady perceived progress for consumers, business interests now have cause to hope that this trend may pull back somewhat in 2017. For example, we could see a shift back to judicial approval of fairly crafted customer arbitration agreements. There could even be a softening of the "disparate impact" phenomenon where regulators and courts have held that there may be unlawful racial discrimination even where there is no intent to discriminate, and even where the relevant data cannot justify a discrimination claim. Do not celebrate just yet. But fairness for businesses may actually become a genuine consideration in consumer agreements and legal disputes.

11. Environmental Issues (15)

Nowhere will the battles in domestic legislation and regulation be more intense than in environmental matters. As of the end of 2016, rhetoric about Mr. Trump's appointees for the Energy Department, the Interior Department and the Environmental Protection Agency was at fever pitch. The blowback was especially harsh with the naming of Scott Pruitt, Oklahoma's attorney general, as the choice to head the EPA. *See, e.g.*, Editorial, "An Enemy of the E.P.A. to Head It," N.Y. Times, Dec. 8, 2016. Kimberly Strassel makes the case for Pruitt as a long-needed antidote to EPA overreach: "He's a constitutional scholar, a federalist.... [H]e is a sublime choice to knock down the biggest conceit of the Obama era – arrogant, overweening (and illegal) Washington rule." "Trump's Federalist Revival," Wall Street Journal, Dec. 9, 2016. The underlying environmental policies of the Trump administration will determine much about how dealers will be doing business, and the likelihood is that environmentally-related regulatory actions will recede, and business costs will go down with new policies. *See*, Kimberley Strassel, "Trump's Environmental Reset," Wall Street Journal, Nov. 25, 2016.

Bottom line: The power and reach of the EPA will start to erode in 2017 on issues relevant to dealers. At the end, for dealers, if the new administration succeeds, the political battles over environmental issues will translate to a continuation of the flow of inventory that consumers want. The bottom line is that dealer profitability will likely get a substantial boost. But the arguments and counter-arguments, already ugly and ad hominem, will get even more coarse.

12. Recalls: Reaping the Whirlwind of the Last Two Years (12)

The automotive recall phenomenon might abate somewhat with a Republican president, but probably not much. The industry should expect aggressive legislative steps in the aftermath of Takata airbags and other prominent recall actions, not to mention VW's intentional misconduct. Recalls – voluntary and mandatory – will still happen often, with a greater impetus for auto franchisors to be conservative. When in doubt: recall. Recall issues still plague dealers and consumers, and some believe that delaying sales across the brand is too strict as a standard. Some recalls are not safety related. *See*, Editorial, "Don't Quit Trying to Fix Recall System," The Automotive News, Dec. 12, 2016. When a manufacturer decrees "stop sell," some franchisors inadequately compensate dealers and some do not offer any compensation.

Bottom line: Expect a continuation of heavy recall traffic in 2017. Manufacturers are so shaken by the consequences of belated corrective actions (and misconduct) that they now tend to default to the recall option with dispatch. Dealers should be ready and willing to demand adequate compensation from their franchisors for their losses. After all, recalls stem from factory defects, in which dealers play no role, except to help cure the factories' mistakes and to placate the customers.

13. Terrorism, Unrest, and Natural Disasters (17)

This trend climbs higher from last year for one particular reason: the threat of terrorism within the United States. It is here, and the problem is growing.

As this article goes to publication, the concern with terrorism is front and center in American life. Although I have ranked this subject in previous editions, it now seems that many others are also addressing the growing concern for American businesses. *See, e.g.,* David Gurnick, "Franchise Systems' Role in Combating Terrorism," *The Franchise Lawyer*, Spring 2016, Vol. 19, No. 2.

More than ever, terrorists see businesses with commercial traffic as potentially lucrative targets for their evil. They aspire to disrupt American life and produce fear in the population. For now, and for the foreseeable future, businesses must be proactive.

So, what can car dealers do to protect their employees, customers, and facilities? First, as part of training and written policy, all employees need to understand their responsibility to report suspicious activity immediately. To the extent feasible and practical, designs and materials in building and renovations should avoid the potential for possible dangers, such as flying glass and construction using materials less susceptible to causing injury. Much more detail is contained in Mr. Gurnick's article, but sad to say, this is the world we live in.

Of course, natural disasters, such as earthquakes, floods and storms (think Hurricane Sandy) can upend dealer operations for weeks, or even months.

Bottom line: Dealers must consider the growing American concern with terrorism, and this issue should be reflected in a number of ways at every dealership. Dealers thrive on consumer access to large, open showrooms and lots. Robust security measures, without scaring customers, has to be a goal. As always, dealer plans should also anticipate steps to be taken when a natural disaster hits.

14. Warranty Reimbursement (10)

Yes, this old chestnut is still around, including special surcharges by manufacturers to "recover additional warranty costs" where dealers seek to be reimbursed at retail under applicable state law.

Bottom line: As the years pass, dealers' rights to be reimbursed at retail for warranty labor and parts are honored in more states than ever. Franchisors fighting this trend will mostly lose.

15. Alternate Dispute Resolution (14)

For years now, dealer arbitration clauses in agreements with consumers have been under assault. This is especially so for pre-dispute, mandatory arbitration agreements generally, and most emphatically where clauses forbid class or multi-claimant actions. Courts do tend to side with consumers, and many view pre-dispute mandatory arbitration as anti-consumer.

Bottom line: Once the darling of legal disputes, ADR has taken a tumble. Consumer advocates hate it with a passion. But ADR can be a good thing, especially where the stakes of a dispute are small. 2017 should see a partial return to the legal acceptance of this process.

16. Taxes (20)

Mr. Trump's 2016 election campaign was full of promises to reset the "unfair," "complex" and "out of control" federal tax scheme. He promises to reduce the corporate income tax from 35% to 15%, and to consolidate seven personal income tax brackets to three. This is a key component of his plan to jumpstart the underperforming economy to serial GDP growth rates to 4% per year. That event would trigger more retail auto sales.

Bottom line: With Republicans in power at the federal level, look for some good news for dealers – and their customers. Reduction in corporate tax rates should happen, as should a dialing back of individual brackets and rates. If these initiatives are successful, they will stoke consumer spending, and dealers will materially benefit, as will the general economy.

17. Succession Planning (NR)

There are at least two principal issues here. First, there is the question of who will own and operate the dealership after you. Second, there is the issue of sensible estate planning. Sometimes the two issues work together – *i.e.*, when a son or daughter is expected to become the dealer. With many changes in estate and inheritance laws, and (probably) more to come, every dealer should be attentive to both aspects of succession, and update their plans as needed.

Bottom line: If they want to control the passage of ownership, dealers are well advised to plan for succession, and when allowed by the franchisor, obtain a successor addendum to the dealer agreement specifying and effectively pre-approving the successor.

18. Factory Audits (18)

Usually factory audits are uneventful. Dealer agreements permit them and dealers should be cooperative when they happen. Nevertheless, audits strike fear and suspicion into dealers. Many audits (say, for warranty claims or incentives) end with small chargebacks. A tiny number generate chargebacks in very high amounts, or even launch the possibility of termination in instances where auditors assert that dealer claims were fraudulent.

Bottom line: Dealers: Cooperate fully with factory audits, unless you have solid reasons to believe an audit exceeds legal boundaries (such as a contractual or statutory limit on how far back an audit may go). In 2017, there will be a bevy of audits to test the bona fides of dealer claims for factory incentives.

19. The "Joint Employer" Issue May Fade (13)

With the new administration, the specter of holding many franchisors to be "joint employers," along with their franchisees may be at, or nearing, an end.

Bottom line: American auto franchisors will not be deemed joint employers. This subject probably will not be in the Top Twenty in 2018.

20. Encroachment (Protest Laws) (19)

Dealer challenges to the proposed relocation or establishment of nearby a same-line dealer competitor have been available under most state franchise laws for many years. There are different equitable interests at work here. Although the manufacturer is a key player, the contest is also dealer versus dealer.

Bottom line: Encroachment laws continue to be important protections that allow existing dealers to legally challenge a new or relocating dealer that could usurp the existing dealer's opportunity to sell to and serve customers under a dealer agreement.

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